93-107

NO. _____

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IN THE

Supreme Court Of The United States

OCTOBER TERM 1992

C. LOUIS NOACK and CAROLYN S. NOACK,
Petitioners,
v.
STATE FARM FIRE and CASUALTY COMPANY and JIMMY YOUNG,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule 56 of the Federal Rules of Civil Procedure require that a party who "joins" another party's motion for summary judgment actually file a motion for summary judgment in order to be granted summary judgment?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, C. Louis Noack and Carolyn S. Noack, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming State Farm Fire and Casualty Company's summary judgment when State Farm did not file an actual motion for summary judgment.

OPINIONS BELOW

The unpublished, written opinion of the Court of Appeals for the Fifth Circuit Appeals in Appendix A to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on May 14, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure is set forth in Appendix B.

STATEMENT OF THE CASE

The United States District Court for the Southern District of Texas had jurisdiction pursuant to 28 U.S.C. § 1332.

In 1987, a fire destroyed the Noacks' home and personal property. Their home and its contents were insured under an insurance policy issued by State Farm. Subsequent to the fire, the Noacks filed a proof of claim which State Farm failed to timely pay.

In 1988, the Noacks executed releases settling the contractual portions of their claim with State Farm, but expressly reserving their claim for additional living expenses.

The Noacks later filed in state court a lawsuit against State Farm alleging breach of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act. Respondent, State Farm removed the case to federal court. The Noacks then added the State Farm agent, Jimmy Young, a Texas resident, as a defendant and moved to remand.

In April 1991, Respondent Jimmy Young filed a Motion for Summary Judgment asserting that the Noacks' claim against him was barred by the running of the statute of limitations, and Respondent Young also asserted that the Noacks had previously executed releases on their claims. In their response to Respondent Young's Summary Judgment, *inter alia*, the Noacks claimed that since no diversity of citizenship existed as to Respondent Young, the federal court did not have jurisdiction. Furthermore, the Noacks contended that the statute of limitations did not bar their claims against Respondent Young, and the releases they signed were not discharges of all their extra contractual claims against Respondents.

On March 20, 1992, Respondent State Farm sent a letter to the district court's case manager stating that State Farm wished to "join" in Respondent Young's Motion for Summary Judgment. A copy of this letter was received by the Noacks' attorney. There was absolutely no mention of the fact that State Farm itself was moving for summary judgment.

On March 31, 1992, the district court granted Respondent Young's Summary Judgment and also allowed Respondent State Farm's letter to serve as a motion for summary judgment, thus also granting a summary judgment to Respondent State Farm.

Petitioners argued before the Court of Appeals for the Fifth Circuit that summary judgment for State Farm was improper because State Farm never filed a motion for summary judgment and that there was never a hearing on Respondent Young's summary judgment motion.

Petitioners also argued that they did not receive the requisite ten day notice as required by FED. R. CIV. P. 56(c) before the court issued its ruling.

The Fifth Circuit found that the Noacks had sufficient notice to respond to Respondent Jimmy Young's Motion for Summary Judgment and sufficient notice to respond to Defendant State Farm's letter joining in Respondent Young's summary judgment, and that the notice requirements under Rule 56(c) were met. As to Petitioners' other point of error, the Fifth Circuit adopted the district court's ruling on the executed releases. Therefore, all of the Noacks' claims against Respondents Young and State Farm were precluded.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reason: this Petition presents an issue resolved by the Fifth Circuit that is in conflict with other decisions by the Supreme Court of the United States and with the decisions of other Circuits.

This Court has expressly held that in order for a summary judgment to be granted under Rule 56(c) of the Federal Rules of Civil Procedure, the moving party must file a motion. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986), this Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon *motion*, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. (Emphasis added).

The express language of *Celotex* states the necessity of the filing of a motion before a summary judgment can be considered by the Court.

This Court further enunciated the importance of the motion by holding:

> A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion.... *Celotex* at 323.

Once again, this Court uses express language to signify the filing of a motion is required before a summary judgment can be considered by the Court.

In fact, Rule 56 of the Federal Rules of Civil Procedure specifically uses the term "motion" in describing the correct procedures to follow with regard to summary judgment.

In *Daniels v. Morris*, 746 F.2d 271, 274 (5th Cir. 1984), the Fifth Circuit stated:

> If no hearing is held, the adverse party must have at least ten days to respond to the *motion* for summary judgment. (Emphasis added).

Plainly evident is that the Fifth Circuit requires a motion to be filed by a party seeking summary judgment; no motion was ever filed by State Farm in this case. A letter stating that it "joined" in a co-defendant's motion cannot take the place of a properly filed motion for summary judgment.

The United States Court of Appeals, First Circuit held in *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir. 1989):

> The district court cannot grant a *motion* for summary judgment merely for lack of any response by the opposing party, since the district court must review the *motion* and the supporting papers to determine whether they establish the absence of a genuine issue of material fact. (Emphasis added).

Once again, it can be easily deduced from the First Circuit's express language that a motion must be filed in order for a court to even consider summary judgment.

The United States Court of Appeals, Eleventh Circuit, in *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988), incorporated the Supreme Court's language in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) by stating:

> Rule 56(e) provides that "when a properly supported *motion* for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. (Emphasis added).

The Opinion of the Fifth Circuit below creates a conflict not only among the Circuits, the Supreme Court, and the Federal Rules of Civil Procedure, but also among its own opinions.

Clearly, in order for a summary judgment to be considered by a court, the moving party must file a *motion* with that court.

In this case, the Fifth Circuit allowed a letter from Respondent State Farm to serve as a motion for summary

judgment, thus circumventing the express requirements of the Federal Rules of Civil Procedure, and the well-settled law on summary judgments handed down by the United States Supreme Court, other Circuits, and the Fifth Circuit itself.

This Court should grant certiorari here to mandate that a motion must be filed by a party in order for the Court to grant that party a summary judgment.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
APR 14 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2626
Summary Calendar

C. Louis Noack and Carolyn S. Noack,

Plaintiffs-Appellants,

VERSUS

State Farm Fire and Casualty Company
and Jimmy Young,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(CA H-89 3335)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

C. Louis Noack and Carolyn S. Noack, Appellants, seek review of a summary judgment in favor of the Appellees, State Farm Fire and Casualty Company ("State Farm") and Jimmy Young. The district court held that the claims against Young were barred by the statute of limitations, and that the releases signed by the Noacks released all claims against State Farm and Jimmy Young. We affirm.

Background

In 1987, a fire destroyed the Noack's home and personal property. Their home and its contents were insured under a policy issued by State Farm. The Noacks promptly filed a proof of claim. They contend, however, that State Farm failed to timely pay them proceeds owed under their policy.

The Noacks eventually settled their claim with State Farm. On June 14, 1988, and August 3, 1988, via execution of separate releases, the Noacks discharged State Farm from any claims for the content loss and structure loss under their

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

policy. [2] The Noacks expressly reserved only their claim for additional living expenses.

The Noacks later filed suit in state court to recover damages for State Farm's alleged breach of its duty of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act. State Farm had the case removed to federal court. Subsequently, the Noacks added Jimmy Young, a Texas resident, as a defendant and moved to remand.

In April 1991, Jimmy Young moved for summary judgment asserting that the applicable statute of limitations had run and the affirmative defenses of release and accord and satisfaction. The Noacks responded asserting that the federal court did not have jurisdiction to hear Young's motion because no diversity of citizenship existed. On March 20, 1992, State Farm filed a letter with the district judge's case manager stating that it wished to join in Jimmy Young's Motion for Summary Judgment and sent a copy to Appellants' counsel. On March 31, 1992, eleven days later, the district court ruled that the Noacks lacked standing to sue State Farm and Young because the releases discharged all of the claims for which the Noacks sued. Additionally, the court found that the statute of limitations barred the Noacks' action against Young.

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2. The Noacks argue that these releases were not intended to include their claims for extra contractual claims. They argue that because they refused to sign an earlier release which expressly included extra contractual claims, these releases only included claims arising under the contract. For the reasons expressed by the district court, we disagree.

Discussion

The Noacks contend that the district court erred in granting summary judgment in favor of State Farm and Jimmy Young for several reasons. First, they argue that summary judgment for State Farm was improper because State Farm did not file a Motion for Summary Judgment and no hearing on Young's motion was ever held. Further, they contend that they did not receive the requisite ten day notice required under Federal Rule of Civil Procedure 56(c) before the Court ruled on the motion. Second, the Noacks argue that the statute of limitations did not bar their claims against Jimmy Young. Finally, they contend that the signed releases did not discharge their claims against Jimmy Young or State Farm.

Summary Judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto, Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587 (1986); *see Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

Before reaching the merits of the summary judgment ruling, we must determine whether the court complied with the 10 day notice requirement of Rule 56(c). Jimmy Young moved for summary judgment in April 1991, but State Farm did not. State Farm instead sent a letter to the court on March 20, 1992, stating that it "join[ed] in the Motion for Summary Judgment filed by Jimmy Young."[3] Eleven days later, the court rendered summary judgment in favor of both defendants on all claims. The Noacks argue that this letter was insufficient to give them notice that a judgment would include their claims against State Farm.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party must have 10 days notice of a motion for summary judgment before a ruling can be entered.[4] Fed. R. Civ. P. 56(c). Rule 56(c) does not require an oral hearing. *Daniels v. Morris*, 746 F.2d 271,274 (5th Cir. 1984). If no hearing is held, the adverse party must have at least ten days to respond to the motion for summary judgment. *Id.* at 274-75; *see Hamman v. Southwestern Gas Pipeline, Inc.*, 721 F.2d 140, 142 (5th Cir. 1983). Rule 56(c) also does not require that the court give parties advance notice of a "date certain" on which it is to decide the motion. *Id.* at 275-76. In fact, a court may grant summary judgment *sua sponte*, *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442 (5th Cir. 1991).

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3. The letter was apparently delivered directly to the judge's case manager and was not officially filed in the record. The Noacks do not contend, however, that the letter was not sent to the court on March 20 or that they did not receive it on March 20.

4. Rule 56(c) states "The Motion [for Summary Judgment] shall be served at least 10 days before the time fixed for the hearing."

The Noacks had notice of the Motion for Summary Judgment filed by Jimmy Young and responded to that motion. When State Farm joined in that motion, the Noacks had notice and an opportunity to respond prior to the court's ruling. The court was not required to hold a hearing or to notify the parties of when it would rule on the motion. The Noacks rely on *Capital Films Corp. v. Charles Fires Productions, Inc.*[5] for the proposition that when the court grants the motion for summary judgment months or even years after the non-moving party has been served with the motion, it is required to give a formal 10 day notice to the parties that it intends to rule on that motion. The cases in this Circuit, however, hold that mere delay in ruling, without court-induced prejudicial inaction, is insufficient to invoke a formal 10 day notice requirement. *See e.g.*, *Daniels*, 746 F.2d at 274; *Hamman*, 721 F.2d at 142; *Prudhomme v. Tenneco Oil Co.*, 955 F.2d 390 (5th Cir.), *cert. denied*, --- U.S.---, 113 S.Ct. 84 (1992). This Court's jurisprudence on this issue in nicely summarized by Judge Wiener in *Prudhomme v. Tenneco Oil Co.*, 955 F.2d at 394.

> [T]he principal distinguishing feature between those cases in which we reversed the district court and those in which we did not [is] court-induced prejudicial inaction. For example, the trial court in *Capital Films Corp. v. Charles Fries Productions, Inc.*,[6] had already docketed the case for trial when, without notice, it granted summary judgment. At one point that court had even stated that it was not going to rule on the motion for summary judgment. There we found that the parties

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5. 628 F.2d 387 (5th Cir. 1980).

6. 628 F.2d at 391.

> were "induced [by the trial court] to believe that the case was going to trial."[7] As Judge Rubin observed in *Daniels*, the other line of cases, possibly best illustrated by *Hamman v. Southwestern Gas Pipeline, Inc.*,[8] involve no indication that the trial court had misled the parties or lulled them into believing that the case would be tried rather than be disposed of by summary judgment.

Prudhomme, 955 F.2d at 394.

We find this case more in line with the *Daniels* and *Hamman* cases. Although the case was docketed for trial, the court gave no indication that it was not still considering all pending motions. We are reluctant to conclude that merely docketing a case for trial amounts to court-induced prejudicial inaction. The Noacks had eleven days from the time State Farm joined in the Motion to file a response with the court before it ruled. The Noacks knew what issues were raised in the Motion and that both defendants supported that Motion. We conclude that the ten day notice requirement under Rule 56(c) was met.

As to the Noacks' remaining points on appeal, upon *de novo* review, we conclude that the district court's opinion is thoroughly reasoned and an accurate statement of the law. We, therefore, adopt the opinion of the district court with regard to the Noacks' remaining issues on appeal.

For the foregoing reasons, the judgment of the district court is
AFFIRMED.

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7. *Id.*

8. 721 F.2d at 143-44.

APPENDIX B

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations. or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonabvle expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES 1937 ADOPTION

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions, in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of

the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O.3, r. 6; Orders 14, 14A and 15; see also O.32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, The Summary Judgment (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-trial Procedure; Formulating Issues) and the **Note** thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

1946 AMENDMENT

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from

moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco, Cal.* 1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.*, C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.*, 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed. Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary

order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.*, C.C.A.7, 1942, 130 F.2d 535; *Biggins v. Oltmer Iron Works*, C.C.A.7, 1946, 154 F.2d 214; 3 Moore's Federal Practice, 1938, 3190-3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vaccum Oil Co.*, supra. See also *Audi-Vision, Inc. v. RCA Mfg. Co.*, C.C.A.2,1943, 136 F.2d 621; *Toomey v. Toomey*, App. D.C. 1945, 149 F.2d 19, 80 U.S.App.D.C. 77; *Biggins v. Oltmer Iron Works*, supra; *Catlin v. United States*, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed. 911.

1963 AMENDMENT

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice & Procedure 159-60 (Wright ed. 1958), and the courts have generally reached by

interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case if as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well pleaded," and not supposititious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp.*, 169 F.2d 580 (3rd Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3rd Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.* 191 F.Supp. 383 (D.Del. 1961); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa. 1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary

judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. S., for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1992

C. LOUIS NOACK and CAROLYN S. NOACK,
Petitioners,

v.

STATE FARM FIRE and CASUALTY COMPANY and JIMMY YOUNG,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NO._____

IN THE

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OCTOBER TERM 1992

C. LOUIS NOACK and CAROLYN S. NOACK,
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Now come Petitioners and through the undersigned file this Supplemental Appendix to the Original Petition for Certiorari heretofore filed. Submitted herewith as Appendix "C" is the Memorandum Of The United States District Court Southern District Of Texas entered April 2, 1992.

Respectfully Submitted

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SUPPLEMENTAL
APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 02 1992
Jesse E. Clark, Clerk
By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. LOUIS NOACK AND	)	
CAROLYN S. NOACK	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION**
	)	**NO. H-89-3335**
STATE FARM FIRE AND	)	
CASUALTY COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM

Plaintiffs seek extra-contractual damages originating from an alleged delay in the processing and payment of their insurance claim. Pending before the Court is the Motion to Remand (Instrument No. 18) submitted by Plaintiffs C. Louis Noack and Carolyn S. Noack. Also pending before the court the Motion for Summary Judgment (Instrument No. 21) filed by Defendant Jimmy Young. Defendant State Farm Fire & Casualty Co. ("State Farm") joined in that motion on March

20, 1992. Having considered the motions, the responses, and the applicable law, this Court is of the opinion that plaintiffs' motion to remand should be denied inasmuch as a cause of action cannot lie against Jimmy Young, and that defendants motion for summary judgment should be granted.

I. STATEMENT OF FACTS

Plaintiffs bring this action in order to recover extra-contractual damages for breach of the common law duty of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act arising from the manner in which their claim for insurance proceeds was handled and resolved by State Farm.

This action was commenced on September 5, 1989, in the 190th Judicial District Court of Harris County, Texas. On September 28, 1989, State Farm timely removed the action, invoking this Court's diversity jurisdiction pursuant to 28 U.S.C. §1332. On October 17, 1990, plaintiffs were granted leave to amend their complaint. The amended complaint named Jimmy Young, primary adjuster for State Farm and a non-diverse party, as a defendant in the action. The plaintiffs subsequently filed a motion to remand. The defendants oppose the motion by maintaining that there has been a fraudulent joinder of Young to strip this Court of its diversity jurisdiction.

Young asserts that this action should not be remanded in that no cause of action can be asserted against him in state court in light of the fact that the two year statute of limitations period has run before he was named as a party to this action. Young contends that assuming *arguendo* that the limitations period has not run the plaintiffs have no cause of action against him inasmuch as they signed a release settling all their claims against State Farm and its adjusters.

Plaintiffs reply insisting that this Court must remand the action because it has no jurisdiction to determine whether a cause of action exists against Young.

This Court will first determine whether a fraudulent joinder has occurred; necessary to that decision is a determination of whether plaintiffs have a valid cause of action against Young. Therefore this Court must determine whether a possibility of recovery exists against Young. If no cause of action can lie against Young because of a purported release signed by the plaintiffs this Court has and may issue a ruling the defendants' motion for summary judgment.

II. DISCUSSION

1. *Fraudulent Joinder*

A. Standard of Review

The doctrine of "fraudulent joinder" was a judicial pronouncement intended to protect non-resident defendants from any misstatement of facts, misjoinder of parties, or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to the Federal Court. *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F.2d 788 (5th Cir. 1949). The burden of proving fraudulent joinder in support of a petition for removal is a heavy one, and the removing party must prove that there is absolutely no possibility that plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in plaintiff's pleadings of jurisdictional facts. *Green v. Amerada Hess Corp.*, 707 F.2d 201 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

Where the removing party grounds its allegations of fraudulent joinder upon the theory that the plaintiff cannot recover from the in-state defendants as a matter of law, the Fifth Circuit has set out the standard to be applied:

> The district court must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff ..... Moreover, the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff ..... If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), only then can it be said that there has been a "fraudulent joinder."

B., Inc. V. Miller Brewing Co., 663 F.2d 545, 549-50 (5th Cir. 1981) (citations omitted).

The Court should not premise the issue of fraudulent joinder on the probability of plaintiff's prevailing on the merits, but only look for the "modicum of sturdiness" for the possibility of recovery. *See generally Green v. Amerada*, 707 F.2d at 204-05. If that possibility exists, then "a good faith assertion of such an expectancy in a state court is not a sham ... and is not fraudulent in fact or in law." *B., Inc. v. Miller Brewing Co.*, 663 F.2d at 550 (quoting *Bobby Jones Garden Apartments v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968)). Therefore, for there to exist a fraudulent

joinder the Court must find that absolutely no possibility of recovery remains against the in-state defendant Mason. *See generally Green v. Amerada*, 707 F.2d at 206. In other words, for the doctrine of fraudulent joinder to apply

> [I]t [must] be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition for remand is heard.

Parks v. New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

2. *The Applicable Law*

Under Texas law, insurance policies are to be liberally construed in favor of the insured, any uncertain language is to be interpreted to avoid forfeiture or diminution of a policy's benefits. *Travelers Indem. Co. of Rhode Island v. Lucas*, 678 S.W.2d 732 (Tex.App. -- Texarkana 1989, no writ).

An insurance company may violate its common law duty of good faith and fair dealing by failing to promptly pay a claim when liability becomes reasonably clear. *Vail v. Texas Farm Bureau Mutual Insur. Co.*, 754 S.W.2d 129, 135 (Tex. 1988); *Aranda v. Insur. Co. of North America*, 748 S.W.2d 210, 212-13 (Tex. 1988). A cause of action for breach of that duty exists where there is no reasonable basis for a denial of a claim or when the insurer fails or delays to determine whether there is any reasonable basis for a denial of the claim. *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) *modified on other*

grounds Murry v. San Jacinto Agency, 800 S.W.2d 826, 829 (Tex. 1990) (limitations holding modified). In order to sustain a claim for breach of good faith, the insured must establish (1) the absence of a reasonable basis for denying or delaying payment of the claim and (2) that the insurer knew, or should have known, that there existed no reasonable basis for denying or delaying payment of the claim. *Aranda v. Insur. Co. of North America*, 748 S.W.2d at 213.

Violations of a duty of good faith and fair dealing may also constitute a violation of §17.46 of the Texas Deceptive Trade Practices Act and article 21.21, §16 of the Texas Insurance Code. *Vail*, 754 S.W.2d at 131-35, 147; *Allied General Agency, Inc. v. Moody*, 788 S.W.2d 601, 604 (Tex. App. --Dallas 1990, writ denied).

In order to determine what inferences can be drawn from a delay and refusal to pay, the court must look at the circumstances that surround the matter. A failure to pay after sufficient time for an investigation has taken place can only be evidence of malice or gross negligence if the failure is arbitrary and capricious. However, if a genuine controversy existed, "this will suffice as a reason for the failure of the insurer to make prompt payment. *Nat. Union Fire Ins. v. Hudson Energy*, 780 S.W.2d 417, 426 (Tex. App. --Texarkana 1989), *aff'd* 811 S.W.2d 552 (Tex. 1991) (citing *McCauley v. Boston Old Colony Ins. Co.*, 256 S.E.2d 19 (Ga.Ct.App. 1979)).[1]

a. standing

Plaintiffs have no standing to bring this action.

---

[1]Although, this Court believes that a genuine controversy existed the Court makes no ruling on this point, rather, this Court's determination is limited to those grounds stated below.

The plaintiffs to this action signed two releases dated June 14, 1988 and August 3, 1988. Harmonizing the terms of those releases [2] this Court is compelled to find that the right of action was conveyed without reservation. This decision stems from the plain language of the release agreement. *See* Def.'s Mot. for Summ. J. Ex. C at p. 7.[3]

b. Limitations

On September 18, 1989, plaintiffs initiated action in state court arising from the insurers dilatory processing of insurance claims stemming from a fire of October 14, 1987.

On June 14, 1988, plaintiffs executed a "Release In Full" settling all of their claims against State Farm and its adjusters. On August 3, 1988 plaintiffs executed a settlement of all claims or potential claims against State Farm and its adjusters except for "Additional Living Expenses." Plaintiff's argue that the releases of June 14 and August 3 are not all encompassing releases in that State Farm presented them with a release on August 1, 1988, which they failed to execute. The release specifically dealt with the release of any extra-contractual, tort and DPTA claims.

---

[2]A thorough review of the relevant releases is had below.

[3]Plaintiffs have not raised the allegation of fraud in the inducement or claim of duress with respect to the release. Plaintiff cannot attempt to raise those claims now as any delay in raising those claims is fatal. The United States Supreme Court has noted that the duress defense must be raised soon after the coercion is applied; in a case involving a negotiated agreement between parties represented by counsel the delay is itself compelling evidence that there was in fact no duress. *See Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 653 (Ct. Cl. 1981) (citing *Silliman v. United States*, 101 U.S. (11 Otto) 465 (1879)).

For limitations purposes, a cause of action accrues at the time when facts come into existence which authorize a claimant to seek judicial remedies, *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990) (citing *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977)). or when an insurance company denies a claim the cause of action appropriately begins to run at denial. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828-829. However, if an insurance company "strings" an insured along without denying or paying a Claim, limitations will be tolled. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828 n.2. In the case at hand, although it may be argued that plaintiffs were strung along, that activity ceased when all but claims for additional living expenses were settled on August 3, 1988. Young was not on notice that he could be a party to this action until September 13, 1990, more than two years after a cause of action against him accrued. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 827. The action against Young is barred.

There exists an additional, independent reason for the denial of the motion to remand.

c. Release and Settlement

Settlement releases apply to almost any action. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1310 (5th Cir. 1983). A adequately drawn release will bar an action. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d at 1313 (citations omitted).

The release of June 14, 1988, stated in relevant part:

> WHEREAS, acceptance of this release and payment of the consideration hereunder are

> merely a compromise and settlement agreement of disputed claims which have been made or *which might otherwise hereafter be made* by Clarence Louis Noack, Jr. and Carolyn Noack ... against State Farm regarding the contents loss, by which State Farm is *forever buying* its peace as to claims or potential claims of Clarence Louis Noack, Jr. and Carolyn Noack for contents loss.
>
> * * *
>
> ... Clarence Louis Noack, Jr. and Carolyn Noack... fully RELEASE ... State Farm ... as well as [its] adjusters ... from, and against all claims, demands, rights, and causes of action whatsoever nature which Clarence Louis Noack, Jr. and Carolyn Noack have or may have for themselves ....
>
> * * *
>
> ... to the extent that Clarence Louis Noack, Jr. and Carolyn Noack have any remaining claims, cause, or causes of action relating to or *arising from, directly or indirectly*, the contents loss, *all such remaining claims are hereby fully and forever CONVEYED, SOLD, TRANSFERRED, and ASSIGNED to State Farm*, without reservation, for the consideration heretofore recited.

Def.'s Mot. for Summ. J. Ex. B at pp. 2-6 (italics supplied, emphasis original).

The release dated August 3, 1988, recited essentially the same terms as the release of June 3 but allowed the Noacks to retain a claim for "Additional Living Expenses" should they so desire. Def.'s Mot. for Summ. J. Ex. B at p. 2.

Plaintiffs assert the notion, supported only by parol evidence, that if the parties intended for the June 14th release to be all encompassing, then State Farm would not have asked plaintiffs to sign the more specific release on August 1, 1988, or allowed them to seek compensation for "Additional Living Expenses" under the release of August 3, 1988.

The Noacks claim that the release of August 1 went unsigned specifically because it contained language barring an action for breach of good faith duty and for violations of the DPTA. The plaintiffs argue that this establishes that both State Farm and the plaintiffs had no intention to relinquish their rights to other causes of action. The plain terms of the releases of June 14 and August 3 clearly demonstrate that the Noacks released and conveyed the right to bring further actions.

These plaintiffs' arguments are unpersuasive. This Court cannot impose a liability on State Farm after valid releases were executed. State Farm merely attempted to bolster its position or executed the additional release in order to accommodate an opposing party. The terms of the August 3 release state that it is "merely a compromise and settlement" and that was "in no way an admission of ... liability." Def.'s Mot. for Summ. J. Ex. C at pp. 1-2.[4]

Moreover, the terms of the releases dictate this result. Texas law is clear. "The courts will enforce an unambiguous instrument as written; and in an ordinary case, the writing alone will be deemed to express the intention of

---

[4]Plaintiffs' argue, although not stated as such, that there was a waiver of the first release. In order to be valid, however, the waiver must be a knowing waiver; the language of the release supports this Court's finding that there was no waiver of the June 14th release.

the parties." *Sun Oil Company (Delaware) v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981). *See also Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982);

Aetna Life and Casualty Company v. Gunn, 628 S.W.2d 758 (Tex. 1982).

If a contract has certain and definite meaning then it is not ambiguous and the Court must construe the contract according to its terms. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). This Court must ascertain the true intentions of the parties as expressed in the instrument. *Id.*

The admission of explanatory extrinsic evidence depends on whether the court finds as a matter of law that a written instrument is ambiguous. *Isbell v. Williams*, 738 S.W.2d 20, 24 (Tex.App. --Texarkana 1987, writ ref'd n.r.e.); *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 527 (Tex. 1987); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 561 (Tex.App. --Corpus Christi 1983, writ ref'd n.r.e.).

The interpretation of a contract becomes a fact issue for the jury only when, after application of the pertinent rules of construction, there remains a genuine uncertainty as to which of two meanings is proper. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). This is so as Texas courts have repeatedly declared that the question of whether a contract is ambiguous is one of law for determination by the court. *See e.g., R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex. 1980); *Coker v. Coker*, at 394.

There are other meanings of ambiguity. A contract may be ambiguous if its meaning is "uncertain and doubtful." *Skyland Developers v. Sky Harbor Associates*,

586 S.W.2d 564, 568 (Tex.Civ.App. -- Corpus Christi 1979, no writ); *Walter E. Heller & Co. v. Allen*, 412 S.W.2d 712, 718 (Tex.Civ.App.-- Corpus Christi 1967, writ ref's n.r.e.) (guarantor liability). A written instrument may be ambiguous if it is "difficult to comprehend or distinguish, [or] of doubtful import," as there is "doubt as to [its] true meaning." *See San Antonio Life Insurance Co. v. Griffith*, 185 S.W. 335 (Tex.Civ.App. -- Fort Worth 1916, no writ); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d at 561; *see also Goff v. Southmost Sav. & Loan Ass'n*, 758 S.W.2d 822, 825 (Tex.App. -- Corpus Christi 1988. writ denied).

The principal purpose of contract construction is to ascertain the intentions of the parties. Therefore, contracts must be construed from a "utilitarian standpoint bearing in mind the particular business activity sought to be served ..." *Neece v. A.A.A. Realty Co.*, 322 S.W.2d 597, 602 (Tex. 1959); *see also Skyland Developers v. Sky Harbor Associates*, 586 S.W.2d at 570.

Courts must give effect to the objective, not subjective, intent of the parties as it is expressed in writing, as that intent control the contract's construction. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex 1985).

This Court must harmonize and give effect to all the provisions of the contract so that none of the writing will be meaningless. *Chapman v. Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). If the provisions in the contract appear to conflict, they should be adapted to reflect the true intentions of the parties. *Ogden v. Dickenson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983). This Court must give weight to each portion of the contract unless there is an irreconcilable conflict. *Id.* Moreover, no

single provision taken alone will be given controlling effect; rather, all provisions must be considered with reference to the whole instrument. *Coker v. Coker*, 650 S.W.2d at 393;

Bush v. Brunswick Corp., 783 S.W.2d 724, 728 (Tex.App. -- Fort Worth 1989, writ denied).

Both releases, and in particular the later release, contained language that unambiguously states that State Farm is "forever buying the peace as to all claims or potential claims." Even without reference to specific claims the language of the release clearly denotes that State Farm would be released from all potential claims. This suit is clearly barred under the terms of the release.

A releasor cannot complain that he or she was ignorant of, or mistaken about the contents of the release, or failed to read it before signing where the signed release itself clearly states that it was read and understood by the releasor. *See Torchia v. Aetna Cas. & Sur. Co.*, 804 S.W.2d 219, 222-24 (Tex.App. -- El Paso 1991, writ denied) (facts similar to the case at hand, claimant released insurer and court determined settlement was fair.)

Clearly, plaintiffs do not have a valid cause of action against Jimmy Young; plaintiffs' motion to remand should be denied. This Court will not address the defendants' motion for summary judgment.

2. Summary Judgment

A. *Standard of Review*

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a notion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere

allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565. 567 (5th Cir. 1987).

2. The Applicable Law

In light of this Court's interpretation of the relevant settlement and release agreements this Court concludes, for the reasons set forth above, that plaintiffs do not have standing to sue in this matter having conveyed that right to State Farm.

Additionally, the release agreement was effective against all potential claims that could be raised, this

broad terminology plainly applies to claims arising in tort and under the DPTA. Defendants' motion for summary judgment should be granted.

III. CONCLUSION

This Court, having considered the other contentions presented concludes, for the reason set forth above, that plaintiffs' motion to remand should be denied and that defendants' motion for summary judgment should be granted. Any other motions before the Court are now MOOT.

Signed at Houston, Texas, this 31st day of March, 1992.

-/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Respectfully submitted,

Supreme Court, U.S.
FILED
AUG 5 1993
CLERK

No. 93-107

In The

Supreme Court of the United States

October Term, 1993

C. LOUIS NOACK and CAROLYN S. NOACK,

Petitioners,

v.

STATE FARM FIRE AND CASUALTY COMPANY and JIMMY YOUNG,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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RULE 29.1 LISTING

State Farm Fire and Casualty Company is owned by State Farm Mutual Automobile Insurance Company. It has no non-wholly owned subsidiaries.

REASONS FOR DENYING THE WRIT

I. Petitioners Present No Compelling Reason To Review this Case

The only ground asserted by petitioners is an alleged conflict with other decisions of this Court and the courts of appeals. Pet. at 4-7. There is neither a conflict nor any other compelling reason to hear this diversity case.

To constitute a conflict, "the conflict relied on normally must be direct . . . [and] substantially indistinguishable." *See* ROBERT L. STERN, EUGENE GRESSMAN, & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE § 6.31(a), at 374 (6th ed. 1986).

The cases cited in the petition hold that there must be a motion for summary judgment; they do not address whether a party can join in another party's motion. Accordingly, the unpublished opinion of the Fifth Circuit does not conflict with the cited decisions.

II. Summary Judgment Was Proper

State Farm relies upon, and incorporates, the opinion of the Fifth Circuit and of the district court, which are reprinted as Appendix A and Supplemental Appendix C to the Petition for Writ of Certiorari.

CONCLUSION

The Supreme Court should deny the writ. The respondents also ask for all other relief to which this Court may find them entitled.

Respectfully submitted,

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